No. 10361

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY, a corporation, SANTA CRUZ OIL COMPANY, a corporation and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

ALBERT V. STEFFEN,

Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

Statement of Case.

Albert V. Steffen, appellee herein, was employed by the Santa Cruz Oil Company, a California corporation, as a watchman on the Steamship Prentiss. The Steamship Prentiss was owned by the Santa Cruz Oil Company. Hillcone Steamship Company, was neither the owner of the Prentiss nor the employer of Steffen and had nothing to do with any of the matters involved in this action. No judgment was taken against said Hillcone Steamship Company and it is in the same position as if said action had been abandoned as to it. The Associated Indemnity Corporation was the insurance carrier for said Santa Cruz Oil Company. Said company owned the steamship Prentiss for about two and one-half years. She never

went to sea during that time and was not in service. Later she was sold to the Craig Shipyards at Long Beach, California and scrapped. She was purchased by the Santa Cruz Oil Company to be reconditioned and fixed up as a tender ship for the fishing reduction plants which were operating out of San Francisco off the Ferralone Islands. Steffen never performed any other job aboard the boat except as watchman. He lived on shore most of the time but he had a bunk and electric heater on the boat. The ship was tied up at the Craig Shipyards in Long Beach. Steffen claimed that he was injured in coming off the ship; that there was a ladder from the bow of the ship to a sort of pontoon that was connected with the dry dock and that when he was going down the ladder he fell and sustained injuries to his back. He claims to have fallen onto the pontoon which was afloat in the dry dock. There was a dispute in the evidence as to whether or not he actually fell and as to whether or not he actually received injuries. It was claimed by the insurance carrier and the employer that his condition was due to arthritis and natural causes and that he never sustained an accident.

Steffen filed a claim for compensation with the U. S. Employees Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act. Issue was joined and hearing was had before Hon. Warren A. Pillsbury, Deputy Commissioner. Evidence was introduced at said hearing which was continued from time to time and at the conclusion thereof the Deputy Commissioner found as follows:*

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*In all cases italics are ours.

"That during the month of February, 1937 the claimant above named was in the employ of the employer above named, Santa Cruz Oil Company, at Long Beach, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Associated Indemnity Corporation:

"That claimant contends that about said time he sustained injuried to his back by the slipping of a ladder extending from a pontoon to said ship, while he was leaving said ship in the course of his work;

"That at said time claimant was employed as a watchman or caretaker on board the S. S. Prentiss and had been so employed for more than two years. That said vessel did not go to sea or engage in commerce or navigation at any [87] time during said period. That there was no crew on board during said time. That said vessel had been purchased by the employer with the intention of reconditioning and remodeling her for service in connection with certain fish reduction plants but that the employer eventually sold said vessel without putting her into use in such or any capacity as a vessel. That at the time of said injury said vessel was indefinitely laid up. That claimant's employment as said watchman and caretaker was not maritime in character."

The Commissioner thereupon rejected said claim and held that claimant's service at the time of his alleged injury was not maritime in character, and that claimant does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

The order rejecting claim and findings of the Deputy Commissioner are set forth at pages 85 and 86 of the Apostles on Appeal.

This Court has jurisdiction to entertain an appeal from a final judgment in an admiralty proceeding.

Statement of Pleadings and Facts.

Thereafter Steffen filed a libel in *personam* on the Admiralty side of the Court in the U. S. District Court for the Southern District of California, Central Division. [Apostles on Appeal, p. 2.] A joint answer was filed on behalf of the respondents Hillcone Steamship Company, a corporation, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation. [Apostles on Appeal, p. 11, *et seq.*] A separate answer was filed on behalf of respondent Warren A. Pillsbury, Deputy Commissioner. [Apostles on Appeal, p. 14, *et seq.*]

The issues framed by the pleadings were generally whether or not the Deputy Commissioner erred in finding that the employment of Steffen was not maritime in character and hence not subject to the Longshoremen's & Harbor Workers' Compensation Act, and erred in rejecting said claim of Steffen.

When the case came on for hearing in the District Court upon stipulation of counsel and order of court the cause was heard on the record as certified by the Commissioner. [Apostles on Appeal, p. 18.] Said record

contained the entire file of the proceedings including the testimony had before said Deputy Commissioner. [Apostles on Appeal, pp. 19 to 87, incl.] Briefs were filed in the District Court on behalf of the various litigants and after submission of the case the judge of the said District Court made his findings and in accordance therewith entered his decree as follows [Apostles on Appeal, pp. 102 to 104]:

> "The above entitled action came on regularly to be heard on the 10th day of June, 1942, before the above entitled Court, the Honorable Harry A. Hollzer, Judge Presiding, without a jury, the libelant appearing by his attorneys, William P. Lord and Fontana & Goldstone, A. A. Goldstone of counsel, the respondents Hillcone Steamship Company, Santa Cruz Oil Company, and Associated Indemnity Corporation appearing by their attorney, Syril S. Tipton and the respondent Warren A. Pillsbury, Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission, appearing by William Fleet Palmer, United States Attorney and Howard V. Calverley, Assistant United States Attorney, Howard A. Calverley of counsel; the parties hereto, through their respective counsel, having stipulated that the liability of the respondents be determined on the issue of whether or not the service or employment of the libelant, at the time he admittedly was injured, was maritime in character, and the cause having been submitted on the record as certified by the Deputy Commissioner and upon the stipulations, oral

arguments and briefs of counsel [104] and the court being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

"It Is Hereby Ordered, Adjudged and Decreed as Follows:

"That libelant is entitled to relief under the Longshoremen's and Harbor Workers' Compensation Act.

"That this cause be remanded to the Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission for the sole purposes of fixing the compensation due to libelant, Albert V. Steffen, by respondents Santa Cruz Oil Company and Associated Indemnity Corporation, and each of them, and, if necessary to take additional testimony in relation to such compensation in order to determine the amount thereof, and to fix the compensation due attorneys for libelant for services rendered in this proceeding.

"It is further ordered that libelant recover from respondents Santa Cruz Oil Company and Associated Indemnity Corporation his costs herein expended, the same to be taxed by the clerk of this Court.

"Dated November 9, 1942.

"H. A. Hollzer,
"U. S. District Judge."

Thereafter the necessary steps were taken for this appeal.

Specification of Assigned Errors.

The assigned errors relied upon are the following: Numbers I to XV, inclusive, printed on pages 112, 113, and 114 of the Apostles on Appeal. (Some of these assignments are overlapping in character but we shall in our brief attempt to group them in the proper manner.)

Steffen's Employment Was Not Maritime in Character.

This case involves the correctness of a decision by the Commissioner under the *Longshoremen's and Harbor Workers' Compensation Act,* 44 Stat. at L. 1424, Chap. 209, 33 U. S. C. Sec. 901, *et seq.* The decision held that Steffen, the claimant could not recover in his proceedings before the Commissioner, because claimant's employment as a watchman and caretaker was not maritime in character.

The assignments of error relating to this phase of the case are as follows:

I.

"The Court erred in finding that the libelant, Albert V. Steffen, was entitled to a decree herein against respondents, Hillcone Steamship Company, a corporation, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation."

II.

"The Court erred in not directing that the libel of the libelant should be dismissed."

III.

"The Court erred in finding that the service or employment of Albert V. Steffen, the libelant, was maritime in character. [112.]"

VI.

"The Court erred in finding that libelant is entitled to relief under the Longshoremen's and Harbor Workers' Compensation Act."

IX.

"The Court erred in directing the U. S. Employees Compensation Commission to fix the compensation due the attorneys for libelant for services rendered in this proceeding."

X.

"The Court erred in directing that libelant recover from respondents, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, his costs herein expended. [113.]"

XIV.

"The Court erred in finding that the U. S. Employees Compensation Commission has jurisdiction of said cause."

XV.

"The Court erred in finding, making and entering its decree against respondents, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, and each of them." [Apostles on Appeal, pp. 112-113-114.]

The above named assignments of error are interrelated and all raise the main question in this proceeding, namely, whether or not Steffen was entitled to the benefits of the Longshoremen's and Harbor Workers' Compensation Act.

The same question is raised by the statement of points on appeal printed in the Apostles on Appeal at pages 120 to 121, as follows:

"1. The libelant was not engaged in a maritime employment.

"2. Since the employment of libelant was not maritime in character the U. S. Employees Compensation Commission has no authority nor jurisdiction to grant libelant relief.

"7. That the finding of the Commissioner that the employment of libelant and his occupation were not maritime in character, was supported by the evidence before him and was correct.

"8. That the District Court erred in directing that attorneys' fees be allowed to attorneys for libelant.

"9. That the District Court erred in holding that the employment or occupation of libelant was maritime in character."

The Employment of Steffen Was Not Maritime in Character and the Ruling of the Deputy Commissioner Was Correct.

See the following authorities on the proposition that a watchman on vessels not in service is not in a maritime occupation.

The Fortuna, 206 Fed. 573;

Gurney v. Crockett, Fed. Case No. 5874, 11 Fed. Cases 123;

The Sirius, 65 Fed. 226;

The Poznan, 9 Fed. (2d) 838;

The William Leishear, 21 Fed. (2d) 863.

Since the Alleged Claim of Steffen Arose From Contact and Not From Tort His Remedy Was Not Under the Admiralty Laws but Under the California Laws.

The alleged injuries arose by reason of contract and not by reason of tort. Steffen was employed to act as a watchman on the S. S. Prentiss which was at all times tied up to the dock. No negligence is claimed. He claims he fell off a ladder which went from the ship to a float attached to the dock while he was going to answer the telephone. Because of his contract of employment he claims recovery and not otherwise. His duties were to be a watchman on a vessel which was not going to sea nor being used by his employer for the doing of any maritime business. During all times of his employer's ownership the vessel was out of service. His alleged injuries were not received in the course of employment under a maritime contract or while the alleged injured servant was performing work of an essentially maritime character. We believe the *Puget Sound Nav. Co. v. Marshall,* 31 Fed. (2) 903 case comes within the doctrine of *Grant Smith-Porter Ship Company v. Rhode,* 257 U. S. 469, 66 L. ed. 321, 42 Sup. Ct. Rep. 157. That case holds that *"in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and, in matters of tort, upon the locality."* The court says in speaking of the text of jurisdiction as follows:

> *"The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled.* Waring v. Clark, 5 How. 441, 459, 12 L. ed. 226, 235; Philadelphia,

W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co., 23 How. 209, 215, 16 L. ed. 433, 435; The Commerce (Commercial Transp. Co. v. Fitzhugh), 1 Black, 574, 579, 17 L. ed. 107, 109; The Plymouth (Hough v. Western Transp. Co.), 3 Wall. 20, 33, 18 L. ed. 125, 127; Leathers v. Blessing, 105 U. S. 626, 630, 26 L. ed. 1192, 1194; Martin v. West, 222 U. S. 191, 197, 56 L. ed. 159, 162, 36 L. R. A. (N. S.) 592, 32 Sup. Ct. Rep. 42. See Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 58 L. ed. 1208, 1211, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733, and Hughes, Admiralty, 2d ed. p. 195."

Under the ruling of the cited cases this was not an admiralty matter. We believe the action should not have been on the admiralty side of the court.

Steffen had a remedy under the California Workmen's Compensation Act. The alleged injuries occurred in California. The employer was a California corporation and (unless the proceeding is barred by the Federal law) was subject to the Workmen's Compensation Act of California.

Labor Code of the State of California, Sections 3201 to 6002, inclusive.

Sec. 21, Art. XX of the Constitution of the State of California authorizes the legislature to "create and enforce a liability on the part of all employers to compensate their employees for any injuries received by said employees in the course of their employment. Employers' Liability Assurance Corporation, etc. v. Industrial Accident Commission, 177 Cal. 775.

We, therefore, have a situation here where there was jurisdiction in the State court and where Steffen had a right to proceed against his employer under the Workmen's Compensation Statutes of California. The finding of the District Court "that recovery of such disability through Workmen's Compensation proceedings may not validly be provided by State law" [Apostles on Appeal, page 101] was erroneous. The District Court decided the case on the theory that such employment was of a maritime nature and therefore not subject to the state laws. The courts of the State of California have affirmed the ruling above quoted in *Grant Smith-Porter Ship Company v. Rhode, supra.* In the case of *Shipbuilding etc. Co. v. Industrial Accident Commission,* 57 Cal. App. 355, the court decides as follows:

> "In determining whether a contract be maritime *the test is, not locality, as in the case of torts, but the subject matter of the contract—the nature of the work to be done.* (Doey v. Clarence P. Howland Co., 224 N. Y. 30 (120 N. E. 53).) 2. A contract for the construction of a vessel is nonmaritime and not within the admiralty jurisdiction. (Thames Towboat Co. v. Francis McDonald, 254 U. S. 242 (65 L. Ed. 245, 41 Sup. Ct. Rep. 65); Grant Smith-Porter Ship Co. v. Rhode, 257 U. S. 469 (66 L. Ed. 321, 42 Sup. Ct. Rep. 157).) Although the uncompleted vessel upon which he was hurt was lying in navigable waters, Toutain's services were not of a maritime nature. Neither his general employment nor his activities at the time had any direct relation to navigation or commerce. (Grant Smith-Porter Ship Co. v. Rhode, *supra.*)"

See also:

New Amsterdam Casualty Co. v. McMaugal, 87 Fed. (2d) 332;

Jones v. International Mercantile Marine Co., 277 N. Y. 640, 14 N. E. (2d) 198.

Assignment of error number V reads as follows:

"The Court erred in finding that recovery for disability through Workmen's Compensation proceedings may not validly be provided by State Law." [Apostles on Appeal, page 112.]

Recovery Should Be Sought by Steffen Under State and Not Under Federal Laws.

The leading case on matters of this nature is *Southern Pacific Company v. Jensen,* 244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. Rep. 524. A comprehensive note as to the applicability of State Compensation Acts to injuries within admiralty jurisdiction appears in a note to 25 A. L. R. 1029. That note discusses the effect of the various state statutes prior to the decision in the *Jensen* case and subsequent thereto. In a very recent case, however, the U. S. Supreme Court, speaking through Justice Black, criticizes the *Jensen* decision and interprets it with reference to the Compensation Statutes of the State of Washington. The recent case is entitled *Davis v. Department of Labor and Industries of the State of Washington,* 87 L. ed. Adv. Ops. 175; 63 Sup. Ct. Rep. 225; U. S. Law Week 4059. (No. 86, decided December 14, 1942.)

Davis, a structural steel worker, was employed by a construction company, to work on a job which involved the dismantling of an abandoned drawbridge which crossed

a navigable river in the State of Washington. Part of that work involved the cutting away of the steel of the bridge with oxyacetylene torches and when loaded in barges cutting the steel again into suitable lengths for transportation. While engaged on this work he fell into the navigable stream and was drowned.

A Washington statute provides compensation for employees and their dependents if its application can be made "within the legislative jurisdiction of the state" and further provides coverage of the Act to "all employers or workmen . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws." A line of opinions of the Supreme Court beginning with *So. Pac. Co. v. Jensen,* 244 U. S. 205, 216, held that under some circumstances states could, but under others could not, consistent with Article III, par. 2 of the Federal Constitution, apply their compensation laws to maritime employees. State legislation was declared to be invalid when it works "material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." When a state could, and when it could not, grant protection under a compensation act, was left as a "perplexing problem".

To remove uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress soon after the *Jensen* decision passed an act giving such injured persons "the rights and remedies under the Workmen's Compensation law of any state". That Act was declared unconstitutional. Congress made another effort to permit

state compensation laws to protect that class of employees but this second act was also held invalid. Then followed the Federal Longshoremen's and Harbor Worker's Act, 33 U. S. C. Sec. 901 *et seq.*, which made clear the purpose of Congress to permit state compensation protection whenever possible by making the federal law applicable only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by law."

Application was made by the decedent's widow under the state law. The Supreme Court of the State of Washington held that the state could not consistently with the Federal Constitution as construed in the *Jensen* case make an award under its state compensation law to the widow of a workman drowned in a navigable river.

Certiorari was allowed to review the decision of the State Supreme Court and the judgment of the State Court was reversed.

The opinion of the court was delivered by Mr. Justice Black. After reviewing the provisions of the state and federal statutes and the course of the case through the courts below, the opinion says:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins

> of state authority must 'be determined in view of the surrounding circumstances as cases arise.' . . . The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."

As to the difficulties which these uncertainties impose on the employee, Mr. Justice Black says:

> "It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law? Yet employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere."

As to those likewise imposed on the employees, it is said:

> "The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above the most competent counsel may be unable to predict on which side of the line particular employment will fall. The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned."

Stating the considerations which seem to suggest that the constitutional questions involved in the *Jensen* case should not now be re-examined, Mr. Justice Black says:

> "We are not asked here to review and reconsider the constitutional implications of the Jensen line of decisions. On the contrary, even the petitioner argues that such action might bring about still worse confusion in an already uncertain field, and points out that state and federal agencies have made real progress toward closing the gap.
>
> The Longshoremen's Act passed with specific reference to the Jensen rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. But the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side.
>
> There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state.
>
> In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute."

Mr. Justice Black closes the statement of his final conclusion as follows:

> "Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under Longshoremen's Act, and it does not appear that the employer has either made the special payments required or controverted payment in the manner prescribed in the Act. . . . Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here any more than in the other cases cited.
>
> Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the petitioner's recovery. The case is remanded for proceedings not inconsistent with this opinion."

(In a discussion of the above case we have used the review published and the language appearing in a recent issue of the American Bar Journal.)

In the case at bar the facts were determined by the Deputy Commissioner and such determination should be binding on the District Court.

Under the ruling of the *Davis* case and the finding of the Deputy Commissioner, we respectfully submit that the claimant Steffen should seek relief under the California statute and not under the Longshoremen's Relief Act.

The District Court Should Have Limited Its Decision to a Determination of the Maritime Question. The Assignments of Error on that Argument Are as Follows:

IV.

"The Court erred in finding that Albert V. Steffen, libelant, sustained certain injuries while engaged in the performance of his duties as a watchman on the S. S. Prentiss."

VII.

"The Court erred in remanding said cause for the sole purpose of fixing the compensation due to libelant, Albert V. Steffen, by respondents, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, and each of them."

VIII.

"The Court erred in directing that additional testimony be taken by the Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission for the sole purpose of fixing the Compensation due to libelant, Albert V. Steffen, in order to determine the amount thereof."

XI.

"The Court erred in finding that libelant sustained an injury and that at the time of sustaining his injuries libelant was engaged in maritime employment upon navigable waters of the United States."

XII.

"The Court erred in finding that at the time of sustaining said injuries libelant was engaged in the performance of the duties of such employment."

XIII.

"The Court erred in finding that the present disability of libelant arose from injuries received in the course of his employment."

All the above assignments of error question the right of the District Court to do more in its decree than decide the question of whether or not Steffen's employment was maritime in character. The same points are referred to in appellant's statement of points on appeal at page 120 of the Apostles on Appeal as follows:

> "4. That the Commissioner did not find that libelant had been injured or that his alleged or claimed injuries were received in the course of his employment.
>
> "5. That since the Commissioner made no finding as to whether libelant had been injured or whether his alleged or claimed injuries were sustained in the course of his employment the Court erred in directing that a hearing be had by the Commissioner on the sole issue of finding the amount of compensation due libelant.
>
> "6. That if said employment of libelant shall be held to be maritime in character it is the duty of the Commission and not of the District Court to determine the fact of injury and whether or not such injury was incurred in the course of the employment." [Apostles on Appeal pages 112 and 113.]

As state in the statement of points on appeal herein:

> "3. The power of the District Court was limited to the determination of whether or not the occupation of libelant was maritime in character.
>
> "4. That the Commissioner did not find that libelant had been injured or that his alleged or claimed injuries were received in the course of his employment.
>
> "5. That since the Commissioner made no finding as to whether libelant had been injured or

whether his alleged or claimed injuries were sustained in the course of his employment the Court erred in directing that a hearing be had by the Commissioner on the sole issue of finding the amount of compensation due libelant.

"6. That if said employment of libelant shall be held to be maritime in character it is the duty of the Commission and not of the District Court to determine the fact of injury and whether or not such injury was incurred in the course of the employment." [Apostles on Appeal page 120.]

The finding of the Deputy Commissioner went no further than to decide on the evidence submitted to him that the employment of Steffen was not maritime in character and, therefore, he could not recover under the provisions of the Longshoremen's and Harbor Worker's Compensation Act. He made no *finding as to whether or not claimant was injured or as to whether or not claimant's injuries were received in the course of his employment.* The District Court in making its decision decreed:

"That this cause be remanded to the Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission for the sole purposes of fixing the compensation due to libelant, Albert V. Steffen, by respondents Santa Cruz Oil Company and Associated Indemnity Corporation, and each of them, and, if necessary to take additional testimony in relation to such compensation in order to determine the amount thereof, and to fix the compensation due attorneys for libelant for services rendered in this proceeding.

> "It is further ordered that libelant recover from respondents Santa Cruz Oil Company and Associated Indemnity Corporation his costs herein expended, the same to be taxed by the clerk of this Court."

In other words, the District Court by its decree made the implied finding that claimant was injured and that he was injured in the course of his employment. This becomes very prejudicial to appellants because it was claimed by them before the Commissioner that Steffen had not been injured; that his physical condition was due to arthritis and chronic ailments and not to any trauma or injuries received during the course of his employment. Those questions we respectfully submit were solely for the determination of the Commissioner. The power of the District Court was limited by the stipulation and by-law to the question of whether or not Steffen's employment was maritime in character and hence whether the provisions of the Longshoremen's and Harbor Worker's Compensation Act applied.

We believe it is well settled that the District Court in a proceeding of this nature cannot make findings of fact for the Commissioner and that if the matter was to be remanded it should have been remanded to the Commissioner for hearing upon the vital questions of whether or not claimant was actually injured and what was the nature and extent of his injuries. Since, therefore, the questions of fact should be determined by the Commissioner there was no power in the District Court to change findings or to make findings for the Commissioner.

Volhn v. Indemnity Insurance Co., 288 U. S. 162;

S. Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251.

The authority to determine facts was confided by Congress to the Deputy Commissioner.

See also:

Williams v. American Employers Ins. Co., 107 Fed (2d) 953. Certiorari denied, 309 U. S. 682;

Crowell v. Benson, 285 U. S. 22.

Conclusion.

We respectfully submit that the decision of the District Court should be reversed and the proceedings dismissed on the ground that the employment of Steffen was not maritime in nature. We further respectfully urge that in any event the decision of the District Court should be modified and that if the case is remanded to the Deputy Commissioner he should be permitted to hear the entire matter on evidence submitted before him and to make his own determination as to whether or not claimant was actually injured and as to whether or not such injuries were received by the claimant in the course of his employment as watchman.

We respectfully urge that the District Court exceeded its authority in attempting to make findings on said matters which were primarily for the determination of the Commissioner, and that the District Court in a proceeding of this nature has no power to find facts for the Commissioner.

The claim, if any, of Steffen comes squarely under the State Compensation Laws of California because his contract contemplated only duties as a watchman upon a vessel which was not being used at any time during his employment and which, in fact, never went to sea after the commencement of his employment and was finally scrapped. There was nothing whatsoever in the character of his duties which contemplated any maritime activity or any service aboard the vessel while it was in use.

Respectfully submitted,

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A. G. Ritter,
Attorneys for Appellant.